

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

STATUS CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, August 14, 2014
10:03 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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15 - and -

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P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 10:03 a.m.)

THE CLERK: The United States District Court for the District of Massachusetts. Court is in session. Be seated.

For a status conference in the case of Dzhokhar Tsarnaev, 13-10200. Would counsel identify yourselves for the record.

MR. WEINREB: Good morning, your Honor. William Weinreb for the United States.

MR. CHAKRAVARTY: As well as Aloke Chakravarty, your Honor.

MS. PELLEGRINI: Nadine Pellegrini for the United States, your Honor.

THE COURT: Good morning.

MS. CLARKE: Judy Clarke, David Bruck, Tim Watkins and William Fick on behalf of Mr. Tsarnaev, whose presence was waived.

THE COURT: All right. Good morning.

There are a number of pending motions, some of which we'll address and some of which we'll not because for some reason -- for some, the briefing may not be complete.

Let's start with the motion regarding what's described as leaks and public comments. I appreciate the government's response to my expressed concern at the last conference, and I

1 refer to the July 18th letter that was sent to law enforcement
2 personnel in the case. The timing of was apparently
3 coincidental with events in the Silva case which led to the
4 comments, so I don't think it was effective to ward off those
5 comments, but I appreciate the content and the communication of
6 it, and I just want to underscore my concern that it be taken
7 to heart by all the ranks.

8 I would only ask if the government has not done so,
9 whether it might, and should, get an affirmative response from
10 the people to whom the letter was sent that they have, in fact,
11 communicated it to their staffs, again, to underscore my
12 concern. Other than that, I think no further inquiries are
13 necessary at this time. So to the extent the motion seeks
14 relief beyond that, it is denied.

15 Let me address now the motion for firewall procedures.
16 I think that the requirement that everything -- that the
17 firewall the AUSA says or does in his duties with respect to
18 this case be in writing is a little too onerous. The thought I
19 had was -- I appreciate that there is some concern, and perhaps
20 prudence, in monitoring it in some way. And my thought was
21 perhaps he could -- is it a he?

22 MS. PELLEGRINI: It is, your Honor.

23 THE COURT: All right.

24 He could maintain a log of his communications, the
25 fact of them, without the substance. In other words, "Talked

1 to Assistant Warden Smith Tuesday afternoon" -- sort of like a
2 billing record, I guess, that a lawyer would do. That would
3 keep track of what interactions there were without adding the
4 burden of having to conduct them in a cumbersome way.

5 Is that something the government would find
6 acceptable?

7 MS. PELLEGRINI: Yes, your Honor. And I'll
8 communicate that to the firewall.

9 THE COURT: Okay. Other than, with respect to
10 communications to the Court, I would expect them to be in
11 writing in the ordinary course anyway, so I don't think we have
12 to provide for that. To the extent they would not be in
13 writing, they would likely be on the record. So I don't think
14 we have to take any steps on that.

15 So beyond that, adding the requirement of the log for
16 communications, I see no reason for any further relief. There
17 were four points raised, and the government agreed with 1 and
18 4. So this addresses Number 2, I think. So that resolves that
19 motion.

20 To the extent there is a still outstanding issue about
21 further discovery of what we might call Todashev matters, I
22 thought actually we had resolved it. I had reviewed the
23 matters that the government submitted in camera, including
24 recordings, and I see no reason to compel any further discovery
25 from that material.

1 Now, I think the remaining issues pertain to in one
2 way or another discovery. Let's take up the motion for what is
3 called a motion for clarification which is about the schedule
4 for defense disclosure of non-Rule 12.2 expert materials,
5 information, summaries.

6 Mr. Bruck?

7 MR. BRUCK: Thank you, your Honor.

8 Of course this concerns penalty phase non-12.2
9 discovery. And the Court's scheduling order did not specify or
10 differentiate. As we looked further at this issue, we were
11 struck by the fact that this is a disclosure requirement which
12 is generally foreign to federal death penalty cases throughout
13 the country, and that is really illustrated, I think, by the
14 fact that the government's only recent case is a single Puerto
15 Rico District Court decision involving, we think, quite
16 inapposite facts and involving what ended up to be mid-trial
17 disclosure of -- or actually postconviction -- post-guilt-phase
18 disclosure of two expert witnesses, I think one of which was
19 eventually withdrawn.

20 So the government's authority for the idea that there
21 is broad-ranging discovery of defense penalty-phase expert
22 witnesses prior to the guilt phase even beginning is razor
23 thin, and that's for a reason. Even beyond mental health
24 evaluations which involve direct interviews with the client and
25 have obvious Fifth Amendment implications, so does the entire

1 range of the life history investigation and the expert
2 consideration of the implications of the defense case in
3 mitigation that is raised by -- that is at issue in this
4 motion.

5 This is the laying bare of a defendant's past, of his
6 upbringing, of his history, his relationships, in a way that
7 simply implicates the right to remain silent, the right against
8 compelled self-incrimination and the right to counsel. The
9 leading case that is codified in 12.2, *United States versus*
10 *Beckford*, the seminal case dealing with mental health discovery
11 provides a good example where Judge Payne in that case denied
12 the government's request for the sort of broad-ranging
13 discovery of non-testimonial, non-interview information from
14 the defense on the grounds -- prior to trial on the grounds
15 that it would chill the defense pretrial investigation.

16 In other words, the government's insistence that we
17 lay bare prior to the beginning of voir dire, prior to the
18 calling of the first witness of the guilt phase, our case in
19 mitigation through our experts is uncharted territory. It has
20 been implicitly rejected by the federal courts in the 500 cases
21 that have been over the -- that have been through the process,
22 almost 500 cases until now.

23 We think there's no authority for it. We think
24 it -- I certainly understand why the government would like to
25 have it. Every lawyer wants to know as early as possible what

1 the other side is up to. I get that. But even in mental
2 health evaluations the government doesn't get their own
3 evaluation, let alone the defense evaluation, until after the
4 guilt phase is over, and the same ought to be true here. And
5 there is certainly no authority for the other proposition.

6 And for that reason we think the ambiguity -- I
7 understand the government says we should have raised this a few
8 weeks earlier. We feel -- frankly, we are on a bobsled ride
9 and these issues are coming at us in the middle of all the
10 discovery, issues that are the subject of other motions, a
11 million miles an hour. And if we are two weeks late in raising
12 this, we're two weeks late, but I think the important thing is
13 that we are raising it timely.

14 The government says, no, because we raised it a week
15 or so before they made their penalty-phase expert disclosures.
16 But when you look at what their penalty-phase expert
17 disclosures consist of, it turns out there's nothing there. Of
18 the 17 experts that they saved until the last day and served at
19 six o'clock at night on August the 1st, 16 of the 17 are
20 guilt-phase experts, some of whom they propose to re-call
21 mostly because the additional evidence that they intend to
22 elicit from these guilt-phase experts of the penalty phase is
23 so prejudicial that it's probably inadmissible at any phase.
24 And then there's one additional expert that they propose to
25 call only at the penalty phase.

1 There could be such a thing as detrimental reliance,
2 but there is no detrimental reliance here because there are no
3 penalty-phase disclosures worthy of the name. And even if the
4 experts they had disclosed were penalty-phase experts, when you
5 read the disclosures, they're not disclosures. They are, for
6 the most part, with a handful of exceptions, just a listing of
7 the sorts of subjects that their experts intend to opine about
8 without even the opinions, let alone the reasons and bases for
9 those opinions.

10 So the government has not made penalty-phase
11 disclosures worthy of the name. And even if they had, we don't
12 think that there is authority under federal law. There is no
13 really substantial precedent under -- in federal capital case
14 practice to require us to make these full-blown disclosures in
15 advance of a trial on guilt or innocence.

16 THE COURT: You will have some experts who will
17 testify to matters not personal to the defendant, won't you?

18 MR. BRUCK: At the penalty phase?

19 THE COURT: Yeah.

20 MR. BRUCK: Not --

21 THE COURT: Not directly. I guess not directly
22 personal; in other words, not about his thoughts or statements
23 or anything like that.

24 MR. BRUCK: Well, they will concern his thoughts and
25 statements as they're reflected in evidence. There will be

1 experts that are not -- that do not base their opinions on
2 interviews with him, if that's what the Court intends to ask.

3 THE COURT: It won't speak to his mental condition.
4 Or to -- and since they haven't spoken to him or to any -- any
5 information or statements that he may have made.

6 MR. BRUCK: That he may have made since his arrest? I
7 mean, this is not an easy line to draw. And that, I think, is
8 why the courts don't go here. It's if it were a mental
9 health -- if it went to his mental condition and were based on
10 statements he made, it would be 12.2.

11 THE COURT: Right. So we'll put that aside because --

12 MR. BRUCK: So we can put that aside. And then the
13 rest is a gray area. And it's not an either/or proposition. I
14 mean, I have to say, in all candor, that we're not going to be
15 ready by September 2nd to make those disclosures in any event,
16 but that's another subject. And so this is not simply a matter
17 of we have something that we don't want to disclose until
18 later. We don't want to be in default. We don't want to be
19 late. And we think we have to raise this in advance, but
20 that's the situation in which we find ourselves.

21 THE COURT: When both sides filed proposed schedules
22 for discovery in the spring, the end of April, the defense
23 proposed that penalty-phase summaries and exhibits would be
24 disclosed by the end of October, which would be before the
25 trial.

1 MR. BRUCK: Yes. And I have to say that that would
2 have been four days before the beginning of trial under the
3 Court's then-existing schedule, if I'm not mistaken. I think
4 the trial schedule had already been established by then.

5 THE COURT: But my point is it was before the trial.

6 MR. BRUCK: Yes. And I have to say that we have
7 looked at the authority and taken a more careful look at
8 the -- at the realities of litigating this and indeed every
9 other federal case, and that -- I should point out that that
10 proposal was rejected by the government. We did not come to an
11 agreement.

12 So that was an attempt to -- that was an attempt to
13 compromise and the government did not find it acceptable. I
14 can understand that we may have contributed to the ambiguity or
15 the confusion that has given rise to our motion to clarify. I
16 don't deny that. But I appreciate the Court's question.

17 THE COURT: One of my previously expressed concerns
18 was that the experts who would be involved in the case would be
19 known before we selected the jury. Don't you think that's an
20 important --

21 MR. BRUCK: Yes. And that involves their names and
22 their domiciles. This is quite different from -- that really
23 is a different matter. That's jury selection. And, sure,
24 absolutely. We -- that is not at issue here. The question is
25 whether we're required to provide the testimony that they're

1 going to -- the summary -- the sorts of things that aren't in
2 the, obviously, first disclosure, the summary, the reasons, the
3 basis, the underlying facts for their opinions, that's not
4 required to seat a jury.

5 THE COURT: Okay.

6 MR. BRUCK: Thank you, your Honor.

7 THE COURT: Who's for the government? Mr. Weinreb?

8 MR. WEINREB: Your Honor, the whole theory of the
9 federal rules which is expressed in many of the individual
10 rules is that federal criminal trials should not be waged by
11 surprise. Each side is supposed to have notice of, generally
12 speaking, what the other side intends to prove, and then is
13 supposed to have discovery of the materials that may be used to
14 prove those points.

15 As the Court knows in the vast, vast majority of
16 criminal cases, the defense doesn't put on a case at all. They
17 certainly often don't put in any exhibits and they frequently
18 don't call any witnesses. But this case is going to be very
19 different. There is going to be a single trial here divided
20 into two phases, and in the second phase the defense is going
21 to put on all sorts of exhibits and evidence and put on all
22 sorts of witnesses.

23 The rules provide for reciprocal discovery for what
24 the defense intends to put on in its case-in-chief in trial.
25 And that is, in every sense, the defense's case-in-chief at

1 trial. And yet we have gotten absolutely nothing from them.
2 Since the moment this case began, we have not gotten a single
3 item of discovery, not anything from which they're going to
4 draw their evidence, not a single bit of notice of what they
5 intend to prove at the penalty phase.

6 And their theory seems to be that they are entitled to
7 take us completely by surprise, that we will not learn what it
8 is that they are going to be putting on as evidence through
9 experts or otherwise in the penalty phase until we hear in
10 opening statement at the beginning of the penalty phase, a
11 phase that may last just a few weeks. And under those
12 circumstances we will have absolutely no opportunity to
13 identify our own experts, hire them, retain them, get them set
14 up to be paid, show them all the evidence that they need,
15 educate them about the case, get preliminary opinions from
16 them, disclose them, put on that evidence. It's just
17 impossible.

18 And the result would be that the jury will hear one
19 side of the story instead of two sides of the story, which is
20 what they're supposed to hear. So it's doing a disservice to
21 the jury to the case, as well as putting the government at an
22 unfair disadvantage.

23 The defense says that the government has only cited
24 three cases in support of the power of the court under the
25 federal rules and its inherent authority to order penalty-phase

1 discovery in advance of trial. And it draws from
2 the -- it -- not -- I'm not saying that the government
3 exhausted the whole universe of cases. We did some research,
4 we found some cases and we cited them. And there well may be
5 more. But the absence of cases enforcing it certainly as a
6 logical matter doesn't give rise to the necessary implication
7 that it's been denied in all the other cases. It may simply
8 have been granted in all the other cases, it may have never
9 been an issue. The defense never may have even disputed it in
10 other cases.

11 I think the more pertinent fact is that the defense
12 could cite only a single case that -- in which the issue was
13 litigated and that the court came out the other way and said
14 that the rules did not empower the defense. That's this case
15 they cite, *United States v. Beckford*. And even in that case
16 the Court said that the authority to impose notice and
17 reciprocal discovery is an inherent judicial power which need
18 not be grounded in a specific statute or rule and may be
19 exercised in exactly the same manner as prescribed by Rules
20 12.2 and Rule 16(b).

21 One can draw from the fact that Rule 12.2 exists the
22 implication that other types of expert discovery need not be
23 withheld from the government until a certain point. And that
24 makes perfect sense. And that dovetails with the -- with the
25 defense's next argument, which is that somehow the defendant's

1 Fifth Amendment rights are implicated by the pre-penalty phase
2 disclosure of penalty phase information.

3 But the Supreme Court has ruled repeatedly that there
4 is no Fifth Amendment implication in the timing of disclosures.
5 Compelling the defense to disclose at a particular point
6 something that they will disclose anyway, later on in the
7 proceedings, does not implicate a defendant's Fifth Amendment
8 rights, and that is why the federal rules provide, for example,
9 the notice of alibi has to be given very early in the
10 proceedings, notice of an insanity defense can be -- has to be
11 given early in the proceedings, notice of other defenses has to
12 be given.

13 We filed a motion for a list of mitigating factors,
14 simply a list of what they are going to be. The defense argued
15 that would be a violation of the defendant's Fifth Amendment
16 rights. There's simply nothing to that.

17 And as for the question of whether the defendant will
18 be compelled to disclose statements that he has made post trial
19 through an expert, that is addressed by Rule 12.2. We're not
20 asking that the defendant be compelled -- that the defense be
21 compelled to disclose post-trial statements, if any, that he's
22 made to his attorneys or that he's made to --

23 THE COURT: Post-arrangement is what you mean.

24 MR. WEINREB: I'm sorry? Post-arrangement. I'm
25 sorry. I misspoke.

1 But the rest of it, it seems to me, the Court clearly
2 has the authority to order. Indeed, in our initial motion to
3 compel reciprocal discovery, which was filed many months ago,
4 we cited innumerable cases where courts have ordered the
5 defense to comply with its reciprocal discovery obligations
6 under the rule.

7 So both as a legal matter, as a practical matter and
8 as a matter of fairness, if the jury is going to hear both
9 sides of the story in this case and the defense is not going to
10 wage a trial by ambush or a trial by surprise, the government
11 needs notice of -- the very notice it is entitled to under the
12 rules, that it's entitled to under the law significantly in
13 advance of the beginning of the liability phase, or there
14 simply is going to be no opportunity to -- for the government
15 to rebut that during the penalty phase.

16 And rebutting the defense's penalty-phase evidence is
17 a right that is clearly given to it by the Federal Death
18 Penalty Act. The act says that both parties shall have an
19 opportunity to rebut the other side's evidence. And for that
20 opportunity to be meaningful in any way the government must
21 have notice of what that evidence is going to be in
22 advance -- sufficiently in advance that it can actually prepare
23 a rebuttal.

24 The local rules contemplate reciprocal discovery at
25 the time of automatic discovery. That would have been 18

1 months ago. We know the defense has spent the last 18 months
2 accumulating evidence, and yet at no point have they ever
3 disclosed a single item of it to the government.

4 So on the whole, I think that putting aside the fact
5 that it seems to the government the Court could hardly have
6 been clear in its discussions -- in the discussions leading up
7 to its order, that we were all talking about affirmative
8 penalty-phase evidence and the defense has just lately come to
9 this view that they should be filing a legal pleading to try
10 and block it, it is -- it was an appropriate order and the
11 Court should stick by it.

12 THE COURT: Mr. Bruck?

13 MR. BRUCK: I do have to respond to the government's
14 claim that they are in the dark about our client. The
15 government has more information about Mr. Tsarnaev than most of
16 us have about ourselves. They have his school records and
17 every scrap of paper; they have all of -- they have all sorts
18 of records; they have the contents of every computer, that is
19 from his home, from his dorm room; they have all of his email
20 and they have his Facebook page. They have an enormous
21 quantity of information. So to say that -- and clearly any
22 mitigation evaluation or expert opinion dealing with
23 Mr. Tsarnaev is going to draw on the very information that the
24 government has amassed kilobytes of already.

25 So I think we need to put in perspective this claim of

1 unfairness that the government is completely in the dark and
2 has no idea what the raw materials are that will go into a
3 penalty-phase discussion. They have most of it already. They
4 had most of it before we did.

5 Finally, I just have to acknowledge that what we come
6 down to is that the government is dissatisfied with the way
7 these federal cases are, in the main, litigated, and thinks
8 that the balance should be elsewhere. The federal rules and
9 the practices of the federal courts and the Federal Death
10 Penalty Act are not an equal two-way street. In a great number
11 of ways they reflect the fact that it is a way easier decision
12 to take a citizen's life than it is to spare it.

13 And so in lots of ways the risk of error is placed on
14 the government, the defendant is given certain protections that
15 are not reciprocated. We plead guilty to that. That is the
16 basis of our argument. We have more disclosure rights than the
17 government: More rights to know what the government is going
18 to use to send a defendant to his death than the government has
19 to find out what evidence will be offered to protect him from
20 the death penalty.

21 That's the way it's set up. That's the way most cases
22 have handled these sorts of disputes. The reason there is so
23 little authority is that generally the government doesn't make
24 demands of the sort you have before you this morning. That
25 explains the mystery of the missing authority. And we think

1 that the Court should adopt the view that we've expressed in
2 our motion.

3 THE COURT: All right. I'll reserve the matter and
4 consider your arguments.

5 Let's turn to the other discovery issues. I think the
6 major one is raised by defendant's motion to compel, Docket
7 No. 440, and a supplemental filing which is 460.

8 MR. WATKINS: That would be regarding the expert
9 testimony?

10 THE COURT: Yes. The expert disclosures.

11 MR. WEINREB: May I interrupt for one moment to say I
12 believe the supplemental filing is not yet ripe for decision.
13 Our due date for --

14 THE COURT: You're right about. It was last week.
15 Correct.

16 (Pause.)

17 MR. WATKINS: Mr. Fick points out 474 had to do with
18 the motion for clarification for --

19 MR. FICK: No.

20 MR. WATKINS: I'm sorry.

21 (Pause.)

22 MR. WATKINS: Regardless, your Honor, I can talk about
23 the expert disclosure.

24 Just to remind the Court of what probably doesn't need
25 reminding, there is a massive amount of evidence in this case,

1 just generally six or seven terabytes of evidence. That
2 terabytes of evidence is comprised of all different things.
3 There are thousands of reports, what we would have called paper
4 reports at one time; document files that have been produced;
5 hundreds, perhaps thousands, of hours of audio and videotape;
6 digital evidence from a variety of computers, cell phones, a
7 dozen or more hard drives' worth of evidence there; thousands,
8 if not tens of thousands, of photographs.

9 And now we've arrived at the point where we're all
10 trying to prepare for the November trial date, and it is the
11 government expert discovery that has loaded an extra layer on
12 top of all of that extra -- all of that massive discovery that
13 we've already had.

14 This is, by and large, discovery that we've asked for
15 disclosures and we've asked for on a long-term basis. Really
16 since the inception of the case we've been asking the
17 government to provide tests and examinations. We asked for an
18 earlier disclosure of experts. The government resisted that
19 and the Court adopted the government's schedule, which was a
20 rolling discovery disclosure of June 30th to August 1st.

21 The scale of the disclosure is really quite
22 breathtaking. It took place over the entirety of that two
23 weeks. On the forensic side of the disclosure, simply the
24 summary of the fields -- not the opinions but the summary of
25 the fields of forensic evidence that was going to be at issue

1 in the government's case -- is 108 pages long. It features a
2 dozen experts and perhaps as many technical support people that
3 may also testify about particular forensic issues.

4 Disclosures provided from the Massachusetts State
5 Police add an additional half dozen experts who will testify in
6 some pretty hotly contested areas: Ballistics, DNA,
7 fingerprints, other kinds of disciplines that have been subject
8 to *Daubert* challenges.

9 The latest and at this point last disclosure was
10 August 1st. That, as Mr. Bruck pointed out, added an
11 additional 18 or so experts testifying in -- or potentially
12 testifying in a variety of fields, a couple involving
13 forensics, again, ballistics that were disclosed on August 1st,
14 but a variety of fields of much more soft sciences, what the
15 Court called the interesting discovery about terrorism and
16 geopolitics. So the disclosure has been quite massive.

17 The sheer numbers of experts and really the potential
18 areas of testimony that the government has presented, or is
19 considering presenting, presents a pretty daunting challenge, a
20 very daunting challenge regardless of everything else that's
21 going on in this case and regardless of everything else that
22 needs to be prepared for trial.

23 Nevertheless, it's possible -- it's possible to tease
24 out opinions. It's possible to get some of the basis. Some of
25 the disclosures we have are almost summaries of opinions as

1 required under Rule 16. And it's possible to get to that point
2 where we know what the government is going to present at trial.

3 But largely that's not true. If, indeed, even for the
4 ones we knew, we had been provided, you know, a couple of
5 months ago, if we had tests and examinations all along, we
6 would have a shot at it. We would be able to get experts lined
7 up. Many of the things Mr. Weinreb just talked about regarding
8 experts, being able to take a look at what the government is
9 really going to put on at trial, determine whether it needs to
10 go to an expert for analysis, lining up those experts, paying
11 for those experts, getting reports back and then considering
12 whether there are any kinds of challenges to be made.

13 But we can't do that. We come down to really a
14 standstill because of the way the government has disclosed and
15 specifically the inadequacies of the disclosure. Expert
16 testimony is very different from other kinds of testimony
17 that's recognized by both Rule 16 and by the local rules. Rule
18 16, in carving out specific kinds of specific things the
19 disclosure and the basis of the disclosure is supposed to
20 include, the local rules about when it's going to be disclosed.

21 It is, as Mr. Weinreb pointed out, particularly
22 important with expert testimony that there be no surprise at
23 trial. This is one specific area where the rules have pointed
24 out not only at trial but even before trial these are things
25 that should be hammered out and should be known and should be

1 able to be litigated if appropriate.

2 The rules simply recognizes that expert testimony is
3 different and that the nature of it requires those extra kinds
4 of consideration. And that's where the problem lies now in the
5 disclosure where what the government essentially has done is
6 given us final reports of some of the disciplines, maybe
7 all -- some of the disciplines where they say this is what the
8 expert testimony is going to be. This is the summary.

9 But it's not. We've attached that to the pleading and
10 the Court can see what it is is results of examinations,
11 examinations that were completed, for all intents and purposes,
12 many months ago, but they are not summary of opinions, they are
13 not the kinds of narrative form that we expect to see where the
14 government tells us, This is what this expert is going to
15 testify to and this is why that expert believes that that
16 testimony is reliable.

17 Examples we've gone back and forth in the pleadings
18 about, FBI fingerprints: Even something as seemingly cut and
19 dried as fingerprints, the government has not yet given us all
20 of the information that we need in an accessible way to
21 determine whether what they're going to present at trial is
22 accurate and whether it's reliable or whether it's subject to
23 challenge.

24 Some of the disciplines do provide -- the
25 Massachusetts State Police fingerprint evidence, we do believe

1 that is enough. That we can go to an expert now and determine
2 whether, in fact, what is going to happen at trial, the
3 specific things that that examiner is going to say, are
4 supported. But that is the exception rather than the rule.

5 We don't have something similar for the FBI. We have
6 specific things that the FBI -- it's clear the analyst will say
7 these fingerprints matched these persons from these items, but
8 to try to get beyond that, the next level, the basis of that
9 opinion is really impossible. It's brought us to a standstill
10 now as we try to go through 90 gigabytes of data to try to
11 figure out exactly what the analyst did, the backup photographs
12 and the like.

13 It's not impossible. It's in there. The government
14 used one example in their sealed exhibits. The government has
15 the advantage of being able to call up that analyst and say:
16 Tell me which of these photographs and which of these files
17 goes with which item. We do not -- and that is the thing that
18 is bringing us to a standstill with a very disorganized
19 disclosure that they've given us -- a massive and disorganized
20 disclosure.

21 The government has faulted us really on this, saying
22 that we've asked too much. Of course it goes without saying it
23 depends on whose ox is gored whether there's too much discovery
24 or too little discovery. We have an obligation where the
25 stakes couldn't be higher to investigate, to make sure that

1 every piece of evidence that the government is going to put on
2 is reliably supported, and that's particularly true in the area
3 of forensic evidence.

4 It is likely, almost certain, that before 2006 AUSAs
5 would shake their head when defense counsel would ask for the
6 backup data to fingerprint matches, the photographs, the bench
7 notes to fingerprint matches. But then came Brandon Mayfield
8 who FBI -- current and former FBI agents matched wrongfully the
9 fingerprint that he left. It shows us that these things are
10 required, they are part of advocacy to look at the underlying
11 data and to be able to have access to that to engage experts to
12 make sure that the evidence is reliable before it goes in,
13 otherwise, mistakes happen at trial. And that's what the Rule
14 16 was designed to prevent. It's particularly true here in the
15 forensic evidence.

16 We've gone through some of the examples in the
17 pleadings and the government talked about some of those. There
18 is a difficulty of seeing the forest for the trees when we
19 start talking about specific examples. We lose sight of
20 exactly the larger forest of this disclosure. We included, for
21 example, the August 1st disclosures, the summaries which, as
22 Mr. Bruck has pointed out, simply aren't summaries. There's
23 nothing there that we can grab onto at this point to go to an
24 expert and say, What can we say in response, or is this person,
25 in fact, giving reliable evidence when he or she says this?

1 We simply have nothing. In some cases we have less
2 than nothing. In the computer forensics issue which is going
3 to be one of the largest pieces of this trial, what we have
4 from the government is that there will be people testifying
5 about specific things that were found on specific devices. We
6 have no idea any of the particulars about those kinds of things
7 which makes it very -- it doesn't make it very hard, it makes
8 it impossible at this stage to do our job, to investigate, to
9 hire experts, to determine whether the government is presenting
10 reliable science reliably applied.

11 It's for those reasons, your Honor, we're asking for
12 the government to go back and provide true summaries of the
13 opinions as required by Rule 16, and we're asking them for an
14 index of this massive disclosure that they gave to us. It's
15 required under the local rules that they give us some kind of
16 organizational principle.

17 As I say, your Honor, we haven't been sitting on our
18 hands since this all came in. We plunk around in this massive
19 disclosure trying to find out where these items might be so we
20 can keep on working, but it is almost a random process for us
21 at this point. We're getting there. And without some kind of
22 summary -- even with some kind of summary we're talking about
23 months before we can get to a point to be able to talk about
24 all these disciplines that the government intends to present at
25 trial.

1 So for all those reasons, your Honor, we would ask
2 that the Court order the government for a more complete
3 disclosure.

4 THE COURT: The government's disclosure letter of June
5 30th, which I think as Mr. Weinreb points out is the one we
6 have to focus on today principally because the government's
7 response to the other one has not yet been filed, but the June
8 letter refers to a searchable Excel index on a DVD. Do I have
9 that in the record?

10 MR. WATKINS: You have the printed version as an
11 exhibit to our filing.

12 THE COURT: I see.

13 MR. WATKINS: That would be --

14 THE COURT: Your Exhibit B, I think, is a -- is that
15 the index?

16 MR. CHAKRAVARTY: It is, your Honor. It's the printed
17 version.

18 MR. WATKINS: It's the printed version of a searchable
19 Excel spreadsheet. But all that is is cuts and pastes, by and
20 large -- there may be some exceptions to that -- cuts and
21 pastes of particular reports by the FBI or the Massachusetts
22 State Police. It is not -- it gives no clue to the underlying
23 reasons, the underlying basis for the opinions. In most cases
24 it doesn't give the opinion itself. And the Court can see from
25 that, that's exactly what is on that searchable index.

1 Is it possible to search for gunshot residue or GSR?
2 It is possible but it doesn't get you anywhere. It gets you to
3 a final report which in itself does not give the opinion and it
4 certainly doesn't give the basis and reasons for the opinion.

5 THE COURT: All right. Mr. Weinreb?

6 MR. WEINREB: Your Honor, I think it's important to
7 distinguish between three different issues here. One is the
8 disclosure that was actually ordered of opinion testimony under
9 certain Federal Rules of Evidence, 701, 702, et cetera. The
10 defense in this case asked of us as part of their expert
11 discovery request that they receive all DNA fingerprint,
12 firearm identification, tool mark identification, gunshot
13 residue, explosive residue or other testing results performed on
14 any item of evidence or on any suspect, victim or witness in
15 this case. And we understood that to be a general request for
16 everything that we have. So we produced it.

17 And when the defense asks -- says they want a more
18 complete discovery, with the exception of a very few things
19 which we are -- they have mentioned to us and we are making
20 sure that we have. And if we haven't included them we will --
21 we have given them everything. So with respect to all of those
22 things I mentioned and more, we have produced both the reports
23 and the examiners' underlying file, which contains all their
24 materials, everything they did, everything they generated.
25 We've also included manuals and audit reports and quality

1 control documents and other things that are not generated by
2 them in the course of their work but that it was something also
3 requested by the defense.

4 Now, to return to where I started, there's opinion
5 evidence. Much of this is not opinion evidence. Most of these
6 examiners are not stating opinions. So there's no opinion
7 evidence to produce. And in cases where examiners did in their
8 reports render an opinion, those opinions are typically set
9 forth in reports.

10 One example, for example, the ballistics report that
11 we attached to our opposition is Exhibit G. The examiner
12 states "It is my opinion that" -- and then states -- "the 9
13 millimeter Ruger caliber discharged cartridge casings mentioned
14 in" -- and it gives their numbers, and there's also written
15 descriptions of them in the report itself -- "were fired by the
16 Ruger that was recovered on the scene. The Ruger model -- and
17 it gives the model, the obliterated serial number, and it gives
18 its identifying number. That is the opinion of the examiner.

19 We're a bit mystified by what the defense wants beyond
20 that. That is a narrative account of what the expert is
21 going -- the opinion that he will give at the trial.

22 In Mr. Fick's reply, which was just filed yesterday so
23 I only read it briefly, but he talks about wanting the
24 government to contextualize that. I really don't know what
25 that means, and whatever it means, I don't think it's required

1 by the local rules. The local rules simply require the opinion
2 and the basis for the opinion.

3 Typically, the reports state what the examiner's basis
4 for the opinion was, and to the extent that that opinion is
5 supported by underlying documents which allow you to understand
6 in ever more finely grained detail how the examiner arrived at
7 the opinion, we have produced that.

8 So the first question -- the first issue is: Have we
9 adequately disclosed the opinions of the experts who are going
10 to testify? And we submit with respect to the items that were
11 required to be produced on June 30th, that we have adequately
12 disclosed the opinions of the experts. Indeed, these are
13 trained experts who worked for the government.

14 This is not a novel request that's made in this case.
15 They're accustomed to generating reports and testifying in
16 court about their opinions, and so they are trained in their
17 reports to write their opinion and the basis for that opinion.
18 And it is routine in the practice of federal prosecutors, I
19 think, with respect to professional kinds of experts like this,
20 to simply say that the experts will testify consistently with
21 the opinions and bases therefor specified in their reports.
22 And they have the reports.

23 THE COURT: You don't anticipate calling every one of
24 the people?

25 MR. WEINREB: No, your Honor. As I say -- for

1 example --

2 THE COURT: So have you indicated which ones you do
3 expect to call?

4 MR. WEINREB: We have not yet because they requested
5 everything and there's no -- it's early in the day for a
6 witness list or an exhibit list. But I think it's clear -- for
7 example, we have given them 20 FBI fingerprint reports,
8 virtually every one of which says "no usable prints were found
9 on this item." And that report speaks for itself. It was a
10 null report; it was a report without any result. The same is
11 true with respect to the vast number of reports that we gave
12 them. Nothing was found. Nothing of interest or use was
13 found.

14 Now, the defense -- it is true that we have given the
15 defense -- they have requested a lot, as the Court is aware,
16 and we have given them a lot. And generally speaking, what we
17 have given them is materials that we ourselves found useful to
18 review and to -- and in the course of reviewing them
19 we -- they're all kept stored electronically because that's how
20 we all do things these days.

21 And so, for example, there were many, many, many
22 witness interviews, or potential witness interviews. And those
23 files, when we get them from the FBI, they just have a number
24 attached to them. And we have renamed them last name, comma,
25 first name, because it's easier for us to search through them

1 and find them that way.

2 So these underlying documents that we got from the lab
3 are organized in the way that the lab organizes them. They're
4 assigned numbers that correspond to lab numbers, dates.

5 Sometimes the lab number and date are concatenated to make a
6 unique file name. And that's the way that the lab organizes
7 its documents and names them and that's the way the labs find
8 it useful to search for them and access them.

9 It's probably not the way that a non-lab person would
10 find useful. Obviously the defense is not finding it useful.
11 But it is not our obligation to go through every single thing
12 that we produce to them, whether there's any requirement that
13 we produce it or not in the first place, and even if there is,
14 frankly, and rename it in a way that they find convenient or
15 they find useful.

16 They can do that if they want. It's a secretarial
17 mater. You have to look at the document, you have to -- or
18 maybe more than a secretarial matter if it's a document that's
19 not absolutely evident on its face what it is. But many of
20 these are. Many of these documents, you click on them and it's
21 a picture of a fingerprint and it has a lab number associated
22 with it. And it's easy enough to rename it fingerprint, lab
23 number. It just takes time.

24 And they apparently are arguing that we need to do
25 that for them. And I don't believe the rules require that.

1 And they certainly don't require it for the massive amounts of
2 information they have requested and we have given them that are
3 not even discoverable in this case, that is not material to the
4 preparation of the defense, that are not items the government
5 intends to use at trial but are simply things they have
6 requested and we have given them to accommodate their desire
7 for everything.

8 I'm not going to address the other items because we're
9 in the process of addressing them in writing right now, but I
10 think that as we state in our motion in some sense the
11 defense's situation they're in right now, it's a situation of
12 their own making in that they have asked for everything and
13 in -- and they have received everything, and now they're
14 finding that they need to go through everything. And it is
15 a -- I agree with them that it's an onerous process. I mean,
16 to some degree we've been doing it ourselves because there are
17 things that we find interesting and useful and we want to index
18 for our own purposes. We have people doing it. I'm sure they
19 could have people doing it for them.

20 But I don't think that their argument that the
21 opinions are not disclosed with completeness or that the
22 underlying documents -- as I say, with a few exceptions which
23 we're willing to dig down deeper for them if it's something
24 that's important to them, we do not agree that that has not
25 been disclosed. It has.

1 THE COURT: Mr. Watkins?

2 MR. WATKINS: Just a couple of things. To
3 Mr. Weinreb's comment that it's way too early for witness
4 lists, he's got that exactly wrong for expert witnesses.
5 That's exactly the point of Rule 16 and disclosure at this
6 point, is that we do disclose the witnesses that are going to
7 testify for opinion evidence and their opinions. And that's
8 what hasn't happened here.

9 It sounds like the government would agree that the
10 Court could order them to summarize which ones they're actually
11 going to call and which of the many opinions that they've
12 included in that spreadsheet which, by the way, they call the
13 summary of expert opinion -- which of those ones is actually
14 expert opinion that they're going to call at trial, and that
15 would certainly further the matter. And that would be
16 compliant with Rule 16.

17 The fact that they decide that they're going to throw
18 in the bathtub, the bath water and everything else that one can
19 think of is -- does not excuse them for -- from identifying
20 what the actual opinion that is going to be testified to at
21 trial is.

22 As far as the lab names and having somebody go through
23 them, that is precisely the problem. We're not talking about a
24 couple of dozen reports; we're talking about 50,000 files that
25 were produced to us. Some of them were in electronic form that

1 required proprietary software. I think we've tracked those
2 down. But some of them are named files that are unique, that
3 the particular lab analyst chooses to do it in a particular
4 way.

5 Could we put a secretary on it? No, because this is
6 too important. This is expert testimony that we're talking
7 about. Someone not schooled in the case is not going to be
8 able to do it. Could we put one of the attorneys on it? Two
9 of the attorneys on it? Three of the attorneys on it? We
10 could and maybe we'd have it done in several months, poking
11 through these individual files and doing what Mr. Weinreb
12 suggests, opening the -- seeing whether they have anything to
13 do with anything and then cataloging them.

14 Can we hand it over wholesale to experts? We can.
15 The Court will pay for it. The experts will bill for that
16 adventure as they try to go through and see which files are
17 interesting to them. When a fingerprint examiner expert gets a
18 file that belongs to DNA, I'm sure he will be calling us up and
19 saying, "Why do I have this?" And the answer will be: "That's
20 what we have to do to get through this particular dump."

21 One other fact that Mr. Weinreb raised I just want to
22 address, as far as conceptualizing the evidence, basis of the
23 opinion is as important as the opinion itself. It's the only
24 way we can test the opinion. Conceptualizing the evidence
25 involves -- I'll give an example. The jury will hear much

1 evidence about what was recovered on Boylston Street in the
2 wake of the two explosions there. They will present examiners
3 from the Quantico laboratory to testify about pieces that were
4 found and their significance. Part of that opinion will be
5 where -- will rely on where it was found, whether it was at
6 Scene 1, Scene 2, somewhere else, that was brought in to talk
7 about those things.

8 We have no way in the government's disclosure to match
9 those things up, to be able to take a picture of an item that
10 was found on Boylston Street and match it up to what the expert
11 is going to testify about that piece of evidence. We could do
12 it if we had years. We could do it. We could catalog each one
13 of those pictures, compare it to pictures that were at the
14 Quantico laboratory, but that's not consistent with a November
15 trial date.

16 The government has that ability to do it. Again,
17 Mr. Weinreb said "We look at it the same way they are." It's
18 not true. They can pick up the phone, they have an FBI agent
19 answer at the other end, they have an FBI analyst answer at the
20 other end to explain those things. We don't have that. That's
21 why the rule requires an index, organizational structure, so
22 that we're able to get to that quickly so that we're able to
23 start our work. It's not there.

24 I think the Court could certainly order the government
25 to narrow it down to the opinions they are actually going to

1 present at trial in each of those, and in each of those
2 situations the basis and opinion -- or the basis and reasons
3 for the opinion, the underlying lab reports connected to that
4 particular opinion. That's what should have happened. I think
5 the Court can order it. I think the government should be able
6 to do that at this point.

7 MR. WEINREB: I would just like to add one other
8 thing, your Honor. Just so the Court doesn't get the wrong
9 impression, we did not simply hand over 50,000 files all in one
10 directory, not divided up in any way. The files are organized,
11 but they're not organized -- and they're within directories and
12 subdirectories and so on and so forth which correspond to
13 disciplines and experts and so on. However, we concede that
14 they're not labeled in a way that's intuitive for attorneys;
15 they're labeled that's intuitive for lab examiners. And so it
16 does take some work if you're an attorney and you want to
17 access it in the way that attorneys think about cases and so on
18 to re-label them. And we are doing that work for ourselves
19 with respect to some of them, and I assume the defense is also
20 capable of doing the same kind of thing with respect to what
21 they're doing.

22 That seems to me to be, in a way, sort of classic work
23 product. When a -- if the government subpoenas records from a
24 corporation or from, you know, in a healthcare case from a
25 medical provider and gets boxes and boxes and boxes of records

1 in return and then scans them all in, we're not obligated to
2 come up with ways of naming all the files in the directories
3 and so on that are useful to the defense before we produce that
4 stuff; we simply produce it. They organize it the way they
5 want, we organize it the way we want.

6 So I don't think it's fair to say that the -- if the
7 Court has a characterization in its head of this as being like
8 we took those boxes and we threw them on the floor and then we
9 just pushed everything together and handed it all over in one
10 giant box or something like that. It's simply not like that.

11 MR. WATKINS: Thirty seconds?

12 Two responses: The analogy to a third party producing
13 records, I understand that. If we were both in the same
14 position, that would make sense. The FBI is a Department of
15 Justice entity. They have total control over when they get the
16 evidence and have the ability to call somebody up at the other
17 end. So it's apples and oranges in that sense.

18 The other thing, concerning these files, our view has
19 always been that they are 16(a)(1)(F) -- right, 16(a)(1)(F)
20 evidence rather than 16(a)(1)(G) evidence, and so should have
21 been turned over in automatic discovery.

22 Be that as it may, the letter that Mr. Weinreb read
23 from was from February. If we had this dump in February, if
24 they'd given us those files in February, we'd have a running
25 chance. I'm not saying we could do it, but at least we would

1 have a running chance. Now it's three months away from trial.
2 What Mr. Weinreb is suggesting that all of us do is simply
3 impossible to be able to effectively prepare, and effectively
4 prepare for the inevitable evidentiary hearings over *Daubert*
5 that have to occur before the evidence even comes in.

6 I'm sorry, I was 90 seconds.

7 THE COURT: All right. I'll reserve this one and
8 probably won't rule until the government's response on the
9 other related motion.

10 And speaking of government's responses, I think -- I'd
11 forgotten where we are now. Did the government move for leave
12 to file a surreply on the venue motion?

13 MR. WEINREB: We did, your Honor.

14 THE COURT: I think you did. Did I grant it?

15 MR. WEINREB: You did not yet. We stated in our
16 status hearing report that we would move orally today for
17 permission to file a surreply.

18 THE COURT: Okay. It's granted.

19 MR. WEINREB: Thank you.

20 THE COURT: When do you expect to do it?

21 MR. WEINREB: I think we could get it in by a week
22 from today.

23 THE COURT: All right.

24 Those are the main items I had. Is there something
25 else -- Mr. Fick?

1 MR. FICK: Your Honor, there are a couple of pending
2 motions to suppress physical evidence --

3 THE COURT: Yes, we're addressing the motions to
4 suppress.

5 MR. FICK: Okay.

6 THE COURT: It's a work in progress.

7 Any other issues?

8 MR. WEINREB: There are a couple of pending sealed
9 motions. I assume we won't be arguing those in open court.

10 THE COURT: Can you give me the numbers?

11 MS. CLARKE: Did the Court receive our status report?

12 THE COURT: Yes.

13 MS. CLARKE: We have them.

14 THE COURT: Oh, they're on the status report?

15 MS. CLARKE: VIII and IX on Number 1.

16 THE COURT: Let me get the status report.

17 (Pause.)

18 MS. CLARKE: VIII and IX.

19 (Pause.)

20 THE COURT: Yes, the matter in Docket No. 404 in VIII
21 is under advisement.

22 MS. CLARKE: Your Honor, the docket numbers on IX,
23 we're a little unclear to ask because we hadn't gotten them
24 back, but what we have is 472 might, in fact, be 476. I'm not
25 sure. And the government reply might be 482, and then we filed

1 a reply to that. But we haven't gotten them to know.

2 MR. WEINREB: You filed --

3 MS. CLARKE: You filed an opposition, we filed a
4 reply. I'm sorry.

5 THE COURT: I think you it's actually 476, and I'll
6 resolve that as well on the papers.

7 MR. WEINREB: Very well.

8 Your Honor, we wanted to raise the issue, at least
9 preliminarily, of jury selection and set some dates -- or ask
10 the Court to at least begin the process of setting some dates.
11 We're assuming that there will be jury summonses sent out
12 specifically for this case.

13 THE COURT: Yes.

14 MR. WEINREB: And we're also assuming, based partly on
15 what Judge Woodlock's experience was in the Azamat Tazhayakov
16 case, where I believe the summonses went out four weeks in
17 advance, that six weeks in advance will be sufficient. I don't
18 know if the Court has a different view.

19 THE COURT: Actually, I'm meeting with the jury
20 clerk's staff today to explore some of those issues. We still
21 have enough time to have a rational schedule. I think I've
22 sort of been informally advised that mid-September is a target
23 for sending out summonses.

24 MR. WEINREB: Yes. So that's actually what we were
25 going to propose. And we had a thought in mind of the best,

1 most efficient way to obtain a jury in this case, we're
2 perfectly willing to talk it over with the defense ahead of
3 time before making a formal proposal, but it would involve
4 sending out with the summonses a hardship question so that
5 when -- and asking that those be returned by mail. Because
6 given the potential length of the trial, that way it could be
7 possible for the parties and the Court to meet ahead of time,
8 go over these, and potentially excuse or defer the service of a
9 large number of jurors and spare them from having to fill out
10 any more extensive jury questionnaire and spare the parties
11 from having to review them.

12 Phase 2 would be to bring in the surviving potential
13 jurors in a large group or perhaps two large groups and do a
14 pretrial publicity voir dire of those groups that would just be
15 focused on that issue in order to whittle the pool further.
16 And only the people who survived that round of questioning
17 would actually be given lengthier questionnaires to fill out
18 which they could be asked to do in the courtroom -- or in
19 the -- wherever, the jury room, wherever they are. And then
20 the parties could begin -- the Court could begin bringing the
21 remaining potential jurors into the courtroom for individual
22 voir dire in smaller groups.

23 So that was our thought. We thought that might be the
24 best way to minimize inconvenience for both the jurors and for
25 all the parties and the Court, but again, we're willing to come

1 up with a joint proposal, but in the event decisions are about
2 to be made about the summons process, we wanted to put it on
3 the table.

4 THE COURT: Fine. Well, those are interesting ideas
5 and I think you should talk with the defense team about them.
6 We have, as you know, had some recent experience, both in Judge
7 Woodlock's case, and last year in Judge Casper's case, with
8 similar procedures so there's some institutional learning on
9 the matter, but I don't think either of those ideas was
10 followed in those cases and so we can explore that.

11 But what was, as far as I know informally, successful
12 in probably both cases was the cooperation of prosecution and
13 defense in a large degree in suggesting the methods. And as
14 far as I know, they were generally accepted by the judges
15 involved. So that could be a very productive way of doing it.

16 I would like to set a further status conference and I
17 thought, again, around the middle of September, about a month
18 from now. I think we have to shorten the leash a little bit.
19 I was looking at the 18th, which is a Thursday.

20 MR. WEINREB: That's good for the government. 10
21 a.m.?

22 MS. CLARKE: That works. Thank you.

23 THE COURT: That works? Okay.

24 With respect to budgeting for the defense, we'll need
25 a September budget, and I think we should shorten that time

1 frame as well. We've been doing multiple months. I think a
2 single month, so...

3 MS. CLARKE: We're on it.

4 THE COURT: Week and-a-half?

5 MS. CLARKE: I think we're going to have to get --

6 THE COURT: How about by -- can you get it by, say,
7 the 25th, which is the beginning of the last week of August?

8 MS. CLARKE: I'm aiming for that. As the Court knows,
9 we've been sending individual --

10 THE COURT: I know. I know all too well. I know you
11 are too.

12 MS. CLARKE: Okay. Thank you.

13 THE COURT: Okay. If there's nothing --

14 Mr. Weinreb?

15 MR. WEINREB: There is one other thing, your Honor.
16 Even though there are pending motions which would take care of
17 it, but to the extent it's necessary, we would ask the Court to
18 exclude the time from today to September 18th.

19 MS. CLARKE: No objection.

20 THE COURT: Yes, that will be done. I think the
21 interest of justice is manifest.

22 Thank you.

23 MS. CLARKE: Thank you, your Honor.

24 THE COURT: We'll be in recess.

25 THE CLERK: All rise for the Court.

1 (The Court exits the courtroom at 11:09 a.m.)

2 THE CLERK: Court will be in recess.

3 (The proceedings adjourned at 11:10 a.m.)

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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 9/5/14